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No. 88-5315

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

EARNEST WILSON,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition for Writ of Certiorari
to the Illinois Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Has petitioner preserved his argument for certiorari review.

II. Does this case present a substantial federal constitutional question.

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OPINION BELOW

A copy of the opinion of the Illinois Supreme Court in People v. Harris et al., No. 63997 (Ill. Sup. Ct. June 20, 1988) has been appended to the petition for writ of certiorari.

STATUTORY PROVISION INVOLVED

Illinois Supreme Court Rule 234, Ill. Rev. Stat. ch. 110A, sec. 234, 87 Ill. 2d R. 234 (1983) provides:

> Voir Dire Examination of Jurors
>
> The court shall conduct the voir dire examination of prospective jurors by putting to them questions it thinks appropriate touching their qualifications to serve as jurors in the case on trial. The court may permit the parties to submit additional questions to it for further inquiry if it thinks they are appropriate, or may permit the parties to supplement the examination by such direct inquiry as the court deems proper. Questions shall not directly or indirectly concern matters of law or instructions.

PRAYER

Respondent respectfully asks this Court to deny the petition for writ of certiorari to review the judgment of the Illinois Supreme Court.

STATEMENT

Represented by separate attorneys, defendants Earnest Wilson, Charles Harris, and Fred Collins were jointly tried for the offenses of murder and conspiracy to commit murder. After returning guilty verdicts for both counts, the jury declined to impose the death penalty. Each defendant was then sentenced to a term of natural life imprisonment.

A unanimous state appellate court affirmed the murder conviction of each defendant. Still represented by separate attorneys, each defendant then perfected an appeal to the Illinois Supreme Court. The cases were consolidated for argument, and judgment of conviction for each defendant was affirmed in People v. Harris, No. 63997 (Ill. Sup. Ct. June 20, 1988). Defendant Wilson has now petitioned for a writ of certiorari.

A brief chronology of events is necessary to an understanding of the petition:

decision of the intermediate appellate court in People v. Zehr	1982
jury selection in the instant case	1983
decision of the Illinois Supreme Court in People v. Zehr	1984
decision of the Illinois Supreme Court in People v. Britz	1986
decision of the United States Supreme Court in Griffith v. Kentucky	1987
decision of the Illinois Supreme Court in People v. Harris et al.	1988

REASONS FOR DENYING THE WRIT

I.

PETITIONER HAS NOT PRESERVED HIS ARGUMENT FOR CERTIORARI REVIEW.

A. Introduction

Before petitioner's trial began in the Will County, Illinois circuit court, co-defendant Collins tendered a written list of supplemental questions for voir dire examination. Collins' proposed questions sought to elicit the jurors' understanding of the concepts of reasonable doubt, the State's burden of proof, and defendant's right to forego testimony on his own behalf. The trial court judge refused the submitted questions, although the same topics were substantially covered in the voir dire examination later conducted by the court and counsel. The trial judge later used standard instructions on all of these issues during his final charge to the jury.

Under Illinois Supreme Court Rule 234, Ill. Rev. Stat. ch. 110A, sec. 234, 87 Ill. 2d R. 234 (1983), a trial court judge in the exercise of his discretion may ask supplemental voir dire questions tendered by the parties. These questions "shall not directly or indirectly concern matters of law or instructions", however. Id. As a result, the Illinois courts have traditionally refused supplemental questions of the very type tendered by defendant Collins in this case. See, e.g., People v. Lobb, 17 Ill. 2d 287, 161 N.E.2d 325 (1959); People v. Davis, 95 Ill. 2d 1, 447 N.E.2d 353, cert. denied, 464 U.S. 1001 (1983) and Ill. Rev. Stat. ch. 110A, sec. 234 (Smith-Hurd 1983) Historical and Practice Note.

In 1982, however, the Third District Illinois Appellate Court, in which jurisdiction the Will County circuit court sits, decided that Collins' proposed topics are proper subjects for voir dire inquiry. People v. Zehr, 110 Ill. App. 3d 458, 442 N.E.2d 581 (1982). Petitioner's trial commenced in 1983. A year after petitioner's trial, the Zehr appellate court decision was affirmed by the Illinois Supreme Court in People v. Zehr, 103 Ill. 2d 472, 469 N.E.2d 1062 (1984).

The Illinois Supreme Court recognized that Zehr "represented a change in Illinois law", or a clear break with past precedent, and accordingly ordered prospective application for the new Zehr rule. People v. Britz, 112 Ill. 2d 314, 493 N.E.2d 575 (1986). Accord, People v. Lego, 116 Ill. 2d 323, 507 N.E.2d 800 (1987). See also People v. Wilson, 98 Ill. Dec. 65, 493 N.E.2d 1086 (1986) and People v. Boswell, 94 Ill. Dec. 447, 488 N.E.2d 273 (1986) (in which the Illinois Supreme Court, in an exercise of its supervisory authority, reversed those appellate courts which had given retroactive effect to Zehr). Upon the authority of Britz, the Illinois Supreme Court again denied retroactivity for the new Zehr rule in petitioner's case.

B. Petitioner did not present a Griffith claim to the state courts.

The Illinois Supreme Court has consistently refused to give Zehr retroactivity. To circumvent this problem, petitioner on certiorari now seeks to bring Illinois retroactivity doctrine into conformity with Griffith v. Kentucky, 479 U.S. __ , 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987). In Griffith, this Court removed the "clear break" exception for retroactivity for cases pending on direct appeal at the time a new constitutional rule is announced. Petitioner did not make any Griffith claim, or otherwise challenge Illinois retroactivity law, in either state appellate court, however.[1]

Before the Illinois Supreme Court, petitioner Wilson merely alleged "reversible trial court error" to refuse Collins' tendered voir dire questions. (Wilson Brief at 15). More specifically, petitioner argued that a trial court judge within the Third Judicial District in 1983 was required to

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[1] Only co-defendant Collins made a Griffith argument before the Illinois Supreme Court in a separate brief filed by his attorney. The cases were then consolidated for argument. Respondent has consistently maintained that petitioner Wilson has forfeited review of any Griffith argument. (State's brief at 15).

follow the precedent of the 1982 Zehr appellate court decision. In Wilson's words, "the trial court can [not] ignore the authority of its own appellate court". (Br. 23). This argument has reappeared in the instant certiorari petition. (Pet. 12, 14). Because petitioner did not seasonably advance his Griffith or other retroactivity challenge in the state courts, certiorari review is inappropriate. Cardinale v. Louisiana, 394 U.S. 437 (1969); Beck v. Washington, 369 U.S. 541, 552-53 (1962).

Equally important, although respondent disputes the notion that any federal constitutional right is inextricably involved in this case (see argument II infra), respondent notes that petitioner below did not attempt to allege a violation of federal law. Petitioner did not challenge the impartiality of the jurors ultimately seated at his trial, claim he was unable to exercise peremptory challenges, or allege a sixth or fourteenth amendment violation. Petitioner did not refer to federal precedents to frame his argument, and petitioner did not cite any cases employing a constitutional analysis. As a result, petitioner's case was decided on state law grounds alone. Because there is an independent and adequate state law ground in this case, this Court should decline 28 U.S.C. § 1257 review. New York Transit Authority v. Beazer, 440 U.S. 568 (1979); Reserve Army v. Municipal Court, 331 U.S. 549 (1947).

II.

THIS CASE DOES NOT PRESENT A SUBSTANTIAL FEDERAL CONSTITUTIONAL QUESTION.

Certiorari review is also inappropriate because no substantial federal question is presented in this case. In the Zehr decisions, the Illinois courts only decided that a trial judge commits an abuse of discretion if he refuses tendered voir dire questions on these topics. The Illinois courts did not purport or attempt to resolve a question of federal constitutional law. Just as there is no constitutional right to a peremptory challenge, Stilson v. United States, 250 U.S. 583, 586 (1919), there is no constitutionally prescribed

formula for voir dire examination. Compare Batson v. Kentucky, 476 U.S. 79 (1986) (racially discriminatory jury selection may deny equal protection of the law) and Turner v. Murray, 476 U.S. 28, 106 S. Ct. 1683, 1688 and n. 10 (1986) (where the sixth amendment was violated in a case of special circumstances involving a capital sentencing proceeding and an interracial murder, although the Court declined to order trial judges to inquire regarding racial prejudice in every case). In general, the sovereign states remain free to promulgate their own rules of criminal trial procedure. Illinois Supreme Court Rule 234, which prescribes but one permissible means to regulate voir dire examination, represents a valid manifestation of this exercise of state power. Cf. Spaziano v. Florida, 468 U.S. 447, 464 (1984) (there is no one right way to formulate a capital sentencing scheme).

In a related manner, the states may formulate their own substantive law of retroactivity; there is no federal constitutional right to retroactivity of a particular decision. Great Northern Railway Co. v. Sunburst Oil and Refining Co., 287 U.S. 358, 364 (1932); Linkletter v. Walker, 381 U.S. 618, 629-29 (1965); Griffith, 107 S. Ct. at 712. Certainly the Illinois Supreme Court is aware of this Court's Griffith decision, but the Illinois court has decided to retain the Stovall v. Denno, 388 U.S. 293 (1967) principles when asked to confer retroactivity for a new state procedural rule. In People v. Erickson, 117 Ill. 2d 271, 513 N.E.2d 367 (1986), for example, the Illinois court applied the Stovall tests to deny retroactivity for a new state law decision concerning pretrial waivers of sentencing juries. In that court's words,

> [b]ecause Griffith addresses a rule which pertains to a constitutional right and the defendant herein seeks retroactive application of a rule which pertains to a statutory right, we do not deem Griffith controlling.

117 Ill. 2d at 284. In sum, the Illinois Supreme Court was permitted to deny retroactivity for a new decision which modified established jury selection procedure. This

Court should not grant certiorari review to formulate a common retroactivity theory for all the several states.

CONCLUSION

Because petitioner's case was decided in accordance with well-established state decisional law, summary reversal is unwarranted. Because petitioner failed to preserve a federal constitutional issue for review, certiorari review is inappropriate.

Respectfully submitted,

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August 26, 1988

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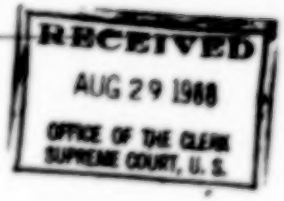

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CERTIFICATE OF SERVICE AND
STATEMENT OF TIMELY FILING

I, Sally L. Dilgart, a member of the bar of this Court and representing Respondent in this cause, certify:

1.) That I have served ten (10) copies of the Respondent's Brief In Opposition on the below-named party, by depositing such copy in the United States mail at 100 West Randolph Street, Chicago, Illinois, with the proper postage affixed thereto, and with the envelope addressed as follows:

Joseph Spaniol, Clerk
United States Supreme Court
Supreme Court Building
Washington, D.C. 20543

2.) That all parties required to be served have been served, to wit:

Joseph M. Cernugel
Block, Krockey, Cernugel, and Cowgill
19 West Jefferson Street
Joliet, Illinois 60431

I further state that this mailing took place on August 26, 1988, and within the time permitted for filing a brief in opposition to a petition for a writ of certiorari.

BY: Sally L. Dilgart
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SUBSCRIBED and SWORN to
before me this 26th day of
August, 1988.

Gail D. Fedorko
NOTARY PUBLIC